87-819

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987.

KEELY SMITH,

Petitioner

v.

INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

Respondents.

On Appeal from the Ninth Circuit Court of Appeals

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Judgment entered October 7th, 1983, resolved all the issues relating to the usurious transaction before the Court, or whether said Judgment left important issues unresolved, and thus was not a final judgment.

2. Whether Petitioner's Motion to Alter or Amend the Judgment Pursuant to FRCP 59(e) filed October 20th, 1983, is to be treated as a nullity, and that if the Court was correct in determining that the Judgment entered October 7th, 1983, was a final one, there is no way Petitioner can obtain relief from said Judgment when said Judgment was clearly erroneous as a matter of law in that the usurious rate of interest was reduced by the Court to a non-usurious rate, rather than following the established law that all interest is forfeited on usurious obligations and all payments made on interest are applied to principal.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987.

KEELY SMITH,

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v.

INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

Respondents.

PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on July 16th, 1986, holding that the Judgment entered October 7th, 1983, was a final judgment, and the Memorandum Opinion

filed June 9th, 1987, wherein the Court of Appeals affirmed the Trial Court's denial of Petitioner's Motion to Treat an Untimely Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under Rule 60(a) 60(b) or Alternatively to Extend the Time for Filing a Notice of Appeal under Federal Rules of Appellate Procedure 4(a)5, and the Order of the Court of Appeals denying Petitioner's Petition for Rehearing filed on July 30th, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals that upheld the Judgment of the District Court that the Judgment entered on October 7th, 1983, was a final Judgment is reprinted in the separate Appendix to this Petition, pp.1-3.

The Opinion of the Court of Appeals affirming the District Court's denial of Petitioner's Motion to Treat an Untimely

Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under FRCP 60(a) and 60(b), or alternatively to extend the time for filing a Notice of Appeal under FRAP 4(a)5 is reprinted in the separate Appendix to this Petition, pp.4-9.

The Order of the Court of Appeals denying Petitioner's Petition for Rehearing filed on July 30th, 1987, is reprinted in a separate Appendix to this Petition, p. 10.

The Judgment of the United District Court for the District of Nevada, entered October 7th, 1983, is reprinted in the Appendix to this Petition, pp.11-14.

The prior Order of the United States District Court denying Motions entered December 28th, 1984, is reprinted in the Appendix to this Petition, pp.15-18.

A prior Opinion of the United States District Court, District of Nevada entered

November 1st, 1985, determining that the Judgment entered October 7th, 1983 was a final Judgment is reprinted in the Appendix to this Petition, pp. 19-29.

The Findings of Fact and Conclusions of Law filed by then U.S. District Judge Harry E. Claiborne on October 6th, 1983, is reprinted in the Appendix to this Petition, pp. 30-60.

The Motion of October 20th, 1983 Under F.R.C..P. Rule 59 to Alter or Amend Judgment filed in District Court, is reprinted in the Appendix to this Petition, pp.61-65.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 16th, 1986, with respect to the finality of the Judgment entered October 7th, 1983 in the District Court. The Judgment of the Court of Appeals with respect to the District Court's denial of Petitioner's

Motion to Treat an Untimely Motion Filed Pursuant to FRCP 59(e) as a Motion for Relief from Judgment under FRCP 60(a) or 60(b), or Alternatively to Extend the Time for Filing Notice of Appeal under FRAP 4(a)5 filed on June 9th, 1987, and the Order Denying Rehearing on said Order of June 9th, 1987, was entered on July 30th, 1987. The Jurisdiction of this Court is invoked pursuant to Title 28 USC § 1154 (1).

QUESTIONS PRESENTED

1. Whether the Judgment entered October 7th, 1983, resolved all the issues relating to the usurious transaction before the Court, or whether said Judgment left important issues unresolved, and thus was not a final judgment.

2. Whether Petitioner's Motion to Alter or Amend the Judgment Pursuant to FRCP 59(e) filed October 20th, 1983, is to be

treated as a nullity, and that if the Court was correct in determining that the Judgment entered October 7th, 1983, was a final one, there is no way Petitioner can obtain relief from said Judgment when said Judgment was clearly erroneous as a matter of law in that the usurious rate of interest was reduced by the Court to a non-usurious rate, rather than following the established law that all interest is forfeited on usurious obligations and all payments made on interest are applied to principal.

STATUTES AND FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE INVOLVED

On the question of the finality of the Judgment, Title 28 USC 1291, FRCP 54(b), FRCP 58, FRCP 79(a) and FRAP 4.

On the issue of relief from the Judgment if determined to be final, FRCP 59(e), FRCP 60(a), FRCP 60(b), FRCP 6(a) prior

to the 1985 amendment, and FRCP 6(a) following the 1985 amendment, FRCP 6(e).

(STATEMENT OF THE CASE)

The case came on for trial before former U.S. District Judge Harry E. Claiborne for the District of Nevada in May of 1983. Post-trial briefing occurred and further arguments were heard by the Court, and it was submitted for decision in June of 1983.

Judge Claiborne filed his written Decision, Findings of Fact and Conclusions of Law and Judgment, which were entered on October 7th, 1983. Petitioner filed a 59(b) Motion on October 20th, 1983. Said Motion was untimely by three days, as FRCP Rule 6 (a) existed in 1983, but was timely as rule 6 (a) existed in 1985. One of the reasons stated by the rule makers for the amendment of 6(a) was that by reason of holidays and week ends being counted, the ten days could be reduced to five

working days, which was the situation in the case at bar. However, Petitioner at that time mistakenly believed that the additional three days for mailing under Rule 6(e) was applicable, and that the Motion filed on October 20th, was timely.

No action was taken by Judge Claiborne on any Motions following the Judgment as he was in indicted on December 8th, 1983, and took a leave of absence until his impeachment proceedings were concluded in 1986.

A number of visiting judges entered various orders in the District Court. The other resident U.S. District Court Judge was disqualified by reason of his relationship to counsel for Petitioner. It was not until mid 1984 that the Honorable Lloyd George became a U.S. District Judge and then took over the case. Judge George recognized that Judge

Claiborne erred in requiring Petitioner to pay 10% interest on a usurious loan; however, Judge George determined that there was nothing he could do because Petitioner's Rule 59(e) Motion was three days late.

Before a written Decision was filed by Judge George, Petitioner raised in the lower court the question of whether the Judgment of October 7th, 1983, was a final Judgment. It became obvious to all concerned that the amount that Petitioner owed was uncertain and up in the air from a reading of Judge Claiborne's Judgment.

Counsel for Petitioner then moved the District Court for a determination that the Judgment was not final. By the time that Motion came on before Judge George, Petitioner had filed a Notice of Appeal from Judge George's denial of relief for Petitioner based upon the three days, when Judge George

questioned whether he had jurisdiction to proceed on the Motion to determine the finality of the Judgment. Thereupon, Judge George granted Petitioner leave to apply to the Ninth Circuit Court of Appeals for a limited remand so that the District Court could consider the Motion as to finality. Petitioner filed such a Motion with the Ninth Circuit Court of Appeals which was granted, and Judge George considered the motion of finality and ruled that it was a final Judgment. Petitioner then appealed from said ruling of Judge George. The Ninth Circuit Court of Appeals consolidated the appeal based upon the three days and upon the finality, but had the briefing of the question of finality first, and the decision on that issue first, which resulted in the Opinion of the Ninth Circuit of the 16th day of July, 1986, holding that the Judgment of October 7th, 1983 was final. Then further

briefing occurred with respect to the three day issue and the Ninth Circuit Court of Appeals affirmed the trial court's ruling denying relief on the three day issue. Petitioner sought rehearing, which was denied. Thus, the instant Petition for Certiorari to the Supreme Court of the United States.

The action below was commenced in 1979 where at that time Petitioner secured a temporary and then later a preliminary injunction, enjoining the Respondents from foreclosing on Petitioner's home in Las Vegas, Nevada on a Deed of Trust held by Respondents to secure obligations set forth in a certain Promissory Note executed by Petitioner to the Respondent International Funding Corporation. Said Note was in the principal amount of $300,000.00, and contained interest at the rate of 18% per annum. The preliminary injunction remained in effect until the

court's Judgment of October 7th, 1983. The Judgment is a short one, consisting of eight paragraphs over three pages. The case was in a curious posture at the time of foreclosure in that the parties foreclosing on the Deed of Trust were the Elerdings. The Note from Petitioner was to International Funding Corporation for 18% interest. The Deed of Trust secured said Note. International Funding Corporation had executed a Note to Elerding for $300,000.00 with interest at 10%, which was a legal rate. International Funding Corporation assigned its Note and Deed of Trust from Petitioner to Elerdings. Elerdings simply foreclosed on International Funding Corporation note at 18%. Elerdings did not first of all foreclose on its 10% note against International Funding Corporation. Judge Claiborne ruled that Elerding was not a holder in due course.

In the Judgment, Paragraph 1 provided that Plaintiff recover $11,500.20 representing prepayment penalty. Paragraph 1 appears to be a final judgment. Paragraph 2 provides that Plaintiff recover from Martin and International Funding Company $35,000.00 constituting loan fees paid, and paragraph 2 also appears to be a final judgment.

Paragraph 3 reads as follows:

> "That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the incremental portion of interest above 10 percent paid by the Plaintiff unto the Defendants on loans transacted in 1976 and 1978."

Paragraph 3 is not a final determination for it does not state what interest payments were made, or what the principal sum of said loans are, or should be, or the date from which interest should run.

Paragraph 4 reads as follows:

> "That Plaintiff have judgment against the Defendants Max D. Martin and International Funding Corporation, a California corporation, in that this court adjudges the loan obligations created by the transactions in 1976 and 1978 to be usurious and the Plaintiff is hereby relieved of any obligation to pay any sum of interest thereon exceeding 10 percent per annum."

The portion of Paragraph 4 adjudging the loan obligation to be usurious appears to be a final determination. However, the part relieving Plaintiff from an obligation to pay any sum exceeding 10 percent is not clear and certain, because the amount of interest in excess of 10% is not set forth in the Judgment, nor is the principal amount set forth. If the principal amount is uncertain the interest amount is uncertain.

Paragraphs 5, 6 and 7 are final orders entering judgment of dismissal on certain claims, counterclaims and crossclaims.

Paragraph 8 provides,

> "That the Preliminary Injunction heretofore issued is dissolved."

Thus, the Court dissolved the injunction that prevented foreclosure on the usurious note. The Judgment did not state the amount due that would be foreclosed upon. It certainly cannot be presumed to grant the Elerdings the right to foreclose on the usurious obligation. The judgment of necessity had to include the amount of money that the Elerdings could properly foreclose on, and the Judgment does not do this. On November 2nd, 1983, Elerding has contended the amount due was $297,270.43. Later Elerding contended $567,148.76 was due.

The Judgment does not address the very complex question of pre-judgment interest, and post-judgment interest.

F.R.C.P. 58 states,

> "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth

and entered as provided in Rule 79 (a)."

Rule 79 (a) provides in part as follows:

"All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the return showing execution of process."

The District Court's docket entry reads as follows:

"10/6/83 136 FINDINGS OF FACT/CONCLUSIONS OF LAW. Cps dist. cc
137 DECISION: (HEC) See document for spcfcs & Judment (#138)./EOD 10/7/83. Cps dist. cc
138 JUDGMENT: (HEC) ORD P recover of Ds Max D. Martin & Intl Funding Corp sum of $11,520; P recover of Ds Max D. Martin & Intl Funding Corp sum of $35,000; etc; P's actn agnst Ds Charles E. Elerding & Janet R. Elerding & said actn dismd on merits; Cntrclmts Max D. Martin & Intl Funding Corp.'s cntrclm against P dismd on merits; Ds Charles E. Elerding & Janet R. Elerding's x-clm agnst Ds Max D. Martin & Intl Funding Corp dismd on merits; P/I issd dissolved.

EOD 10/7/83. Cps dist. cc (see doc for spcfcs)."

The docket entry refers to paragraphs 1, 2, 5, 6, 7 and 8 of the Judgment. Paragraphs 3 or 4, or the substance thereof is not mentioned in the docket entry. Therefore, it is clear that the substance of the judgment is not set forth in the docket entries. Thus the mandatory requirements of Rule 79(a) have not been met, and it must follow that the mandatory requirement of Rule 58 has not been met.

Compliance with these rules was necessary so that Petitioner would know how much money she owed, so that the persons involved in the foreclosure would know the amount of the debt. This Court can look in vain through all the Orders of the District Court and the Court of Appeals, and cannot find a statement that says Petitioner owes a sum certain.

This Court has on numerous occasions determined whether a judgment is final or not to decide whether or not the case is properly before the Supreme Court. Bruce v. Tobin, 245 US 18 (1917), Catlin v. United States, 324 US 229 (1945), Republic Natural Gas Co. v. State of Oklahoma, 334 US 62 (1948), Cohen v. Beneficial Industrial Loan Corporation, 337 US 541 (1949), United States v. F & M Schaefer Brewing Co., 356 US 227 (1958), United States v. Indrelunas, 411 US 216 (1973), Bankers Trust Company v. Mallis, 435 US 381 (1978). Amoco Oil Co. v. Jim Heiling Oil & Gas Co., Inc. & Harmer Oil, No. 85-2107, 107 S.Ct. 468.

Finality of a judgment for purposes of determining the rights to appellate review in the federal system has been clearly established by the above decisions. The decisions discussed two other important reasons for finality. One being that piecemeal review of

litigation will be avoided. The second being it will be a simple matter to compute the time within which post judgment motions and notices of appeals should be filed.

This Court in Bankers Trust Company case, supra, quoted from Professor Moore in discussing the separate judgment requirement,

> "It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. The rule should be interpreted to prevent loss of right of appeal not to facilitate loss."

The District Court and the Court of Appeals in this case have interpreted the finality requirement to defeat the right to appeal, rather than to facilitate it.

This case is different from Bankers Trust, supra, and Amoco, supra. Those cases appear to involve complete adjudications without separate documents as judgments. This case involves a separate document - but an

incomplete document. Rule 58 and 79(a) require a complete and separate document.

When Judge Claiborne dissolved the preliminary injunction allowing the foreclosure to go forward, it was absolutely essential that he set forth the amount of money petitioner owed so that she could take steps to pay off the obligation and avoid the foreclosure. Failing to do this, Judge Claiborne did not render a final judgment.

FRCP 54(b) states,

> "In the absence of such determination and direction any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties."

The October 7, 1983 Judgment was subject to revision under Rule 54(b). So,

clearly Petitioner's October 20th, 1983 Motion seeking a determination of the amount due called upon the District Court to invoke Rule 54(b), and decide the issue. See pp. (61-65) of Appendix.

THE THREE DAY ISSUE

The District Court and the Court of Appeals have held that no relief is available to the Petitioner because the Motion of October 20th, 1983, should have been filed by October 17th, 1983. Petitioner asserts that said Courts erred in not granting Petitioner relief from the 3 day delay for the following reasons, in addition to the finality question:

(a) October 7th, 1983 was a Friday, the date the Judgment was entered and mailed. Monday, October 10th, 1983 was Columbus Day, a non-judicial day.

Counsel for Petitioner left his home in Las Vegas, Nevada, with his wife and three

youngest children on Friday, October 7th, 1983, to spend the holiday weekend in California. Petitioner's counsel was unaware of the filing of the Decision, Findings and Judgment. Counsel for Petitioner returned to Las Vegas, Nevada, on the evening of Columbus Day, Monday, October 10th, 1983. On October 11th, 1983, in the early morning Petitioner's counsel accompanied his wife Phyllis to the hospital so that she could undergo a myelogram that might lead to the performance of a cervical laminectomy, if indicated. The myelogram was performed on October 11th, and was positive and the nuerosurgeon decided to perform the cervical laminectomy on Thursday, October 13th, 1983. Surgery was performed on October 13th, 1983, and Phyllis came through the surgery very well and was able to come home on Saturday, October 15th, 1983. Counsel for the Petitioner spent as much time as he

could with Phyllis and tried to cover his law practice the best he could. In addition, he had to supervise his 17 and 15 year old daughters and take care of the household. Petitioner's counsel studied the Decision, Findings and Judgment over and over again during this period, attempting to really understand what Judge Claiborne intended to do, and could not determine just how Petitioner stood. She had won on the issue of liability as far as usury was concerned, but it appeared that insofar as damages, the Judge had split the baby in half, and dissolved the injunction that prevented foreclosure on Petitioner's home. The Petitioner was performing as a singer in Atlantic City, New Jersey at the time and did not receive copies of the papers for at least a week. Needless to say, she could not understand the Decision either. Counsel and Petitioner were not able

to confer until October 18th, due to the personal problems of counsel for the Petitioner as indicated, and the location of Petitioner in Atlantic City, New Jersey.

Counsel for the Petitioner conducts most of his practice in the Nevada State Courts. Nevada had adopted the Nevada Rules of Civil Procedure, which is closely parallel to federal rules; however, N.R.C.P. 59(e) reads as follows:

> "A motion to alter or amend the judgment shall be served not later than ten days after service of written notice of entry of judgment."

Petitioner's counsel knew that he would not receive a written notice of entry of judgment, as that is not the practice in Federal Court. However, Petitioner's counsel knew that when documents were served by mail, three additional days would be added to the prescribed period, and counsel for Petitioner

read F.R.C.P. 6(e) which is substantially identical to N.R.C.P. 6(e) and concluded erroneously that he had an extra three days to file the Rule 59(e) motion.

On November 1st, 1983, the Respondents Martin and International Funding opposed Petitioner's motion. Said opposition went to the merits and did not deal with the timeliness of the filing of the motions. Respondents Elerdings filed their opposition on the 4th of November, 1983. Said opposition again went to the merits, and did not raise the issue of timeliness. As a matter of fact, the Elerdings stated,

> "This court has equitable jurisdiction to decide the instant motion."

If Respondents had raised the issue of timeliness in their oppositions, Petitioner then had time to file a Notice of Appeal prior to the expiration of 30 days.

Petitioner asserts that the standard of review of Judge George's denial of the motion to grant relief, should not be an abuse of discretion standard because of the peculiar circumstances of this case insofar as Judge Claiborne was concerned. He was undergoing tremendous personal problems at this time and a number of different judges handled this matter. This was not a case where the judge that denied the motion had been intimately involved in the case. The Ninth Circuit in its Opinion applied the abuse of discretion test, and denied relief.

In addition to the foregoing facts, subdivision (a) of Rule 6 was amended in 1985, that would have made the October 20th, 1983 motion timely if the rule was in effect at that time. Advisory Committee's Notes to the 1985 Amendment states in part:

"The rule also is amended to extend

> the exclusion of intermediate Saturdays, Sundays and legal holidays to the computation of time. is less than 11 days. Under the current version of the rules, parties bringing motions under rules with 10 days periods could have as few as five working days to prepare the motions."

This is exactly the factual situation that occurred in the instant case.

The Ninth Circuit's decision had a different result than the case of Wansor v. George Hantsho, Inc. (5th Cir.) 570 F.2d 1202. In that case the district court directed a verdict on March 20th, 1975. On March 28th, a motion for new trial and judgment notwithstanding the verdict and to set aside the judgment was filed. On June 4th, 1975, the district court denied these motions. On June 13th, 1975 Wansor filed a motion to reconsider the June 4th order denying the previous motions. The motion to reconsider was denied on July 22nd, and a notice of appeal was filed on July 24th, 1975. The district court in

that case granted relief finding that the belief of counsel that the motion to reconsider on June 13th was excusable. The district court's opinion was affirmed on appeal. It would appear that if the district court in this case granted petitioner's relief the court of appeals would have affirmed that decision; however, we have in the instant case Judge George who was not the trial judge denying the motion and the 9th Circuit relying upon his discretion. Justice was clearly denied in this case.

The rule makers perceived that Rule 6(a) should be changed to relieve the hardship caused by mailing in a case like this. Should it not be an abuse of discretion to follow the rationale to the rule makers. The Rules of Civil Procedure are designed to secure justice. Thus far Petitioner has been held strictly to the letter of the Rule 59(e) and

6(a) as it existed in 1983. Yet Judge Claiborne and the Clerk have been given a liberal interpretation of Rules 54(b), 58 and 79(a).

Justice requires the Court to grant this Petition and reversal.

RESPECTFULLY SUBMITTED,

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BY: _____
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CERTIFICATE OF MAILING

The undersigned hereby certifies that she served a copy of the Petition for Certiorari, together with a copy of the Appendix to Petition for Certiorari, on counsel for the Respondents, by placing copies thereof in the United States Mails, postage prepaid, addressed as follows:

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DATED this 27 day of October, 1987.

Marlys Osburn

Marlys Osburn

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

Respondents.

On Appeal from the Ninth Circuit Court of Appeals

APPENDIX TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH,	(FILED 7/16/86)
Plaintiff-Appellant	NO. 85-2851
vs.	DC#CV-LV-79-111 -LDG
INTERNATIONAL FUNDING CORPORATION, a Californian corporation, et al.,	Nevada-Las Vegas
	ORDER
Defendant-Appellees	

Before: FLETCHER, NELSON and THOMPSON, Circuit Judges

Appellant Keely Smith appeals from the district court's November 1, 1985 order holding that a prior decision of the district court, entered October 7, 1983, was a final judgment. Each party now seeks summary disposition. We summarily affirm. See United States v.

Hooten, 693 F.2d 857 (9th Cir. 1982) (per curiam).

The October 7 judgment was final and appealable. The judgment was accompanied by an extensive opinion and by equally thorough findings of fact and conclusions of law. The district court never issued a further judgment, and the court's intent to enter a final judgment is clear.

Furthermore, the district court entered a separate judgment in accordance with Fed. R. Civ. P. 58. Rule 58 was amended in 1963 to require entry of a separate judgment precisely to alleviate the difficulties alleged here and discussed in United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958). See Fed. R. Civ. P. 58 advisory committee note; see also Bankers Trust

Co. vs. Mallis, 435 U.S. 381, 386 (1978) (per curiam); United States v. Indrelunas, 411 U.S. 216, 220 (1973) (per curiam). In view of the separate judgment entered here, appellant's attempts to challenge the finality of the October 7 judgment only after she missed a crucial filing deadline are without merit.

Finally, the actual damages awarded to appellant can be ascertained by referring to the opinion and the findings of fact and conclusions of law. Any ambiguity in the judgment should have been resolved by a motion for clarification under Fed. R. Civ. P. 60.

MoCal 6/23/86

(filed June 9, 1987
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH, Plaintiff/Appellant) INTERNATIONAL FUNDING CORPORATION a California corporation; MAX D. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING, an individual; and T.D. SERVICE COMPANY, a California corporation. Defendants/Appellees)	No. 85-1611 DC # CV-LV-79-111 LDG MEMORANDUM[1]

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted May 11, 1987[2]
San Francisco, California

Before: SKOPIL, FARRIS, and O'SCANNLAIN, Circuit Judges

Plaintiff/appellant Keely Smith appeals the district court's denial of her motion to treat an untimely motion filed pursuant to Fed. R. Civ. P. 59(e) as a motion for relief from judgment under Fed. R. Civi. P. 60(a) or 60(b), or alternatively to extend the time for filing a notice of appeal under Fed. R. App. P. 4(a) (5). We affirm the district court.

---

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34 (a), Ninth Circuit Rule 3(f).

DISCUSSION

1. Rule 60(a)

Smith requests relief pursuant to Fed.R.Civ. P. 60(a). We review the denial of her request for an abuse of discretion. Cintron v. Union Pac. R.R., 813 F.2d 917, 919 (9th Cir. 1987). In determining whether a district court should alter a judgment pursuant to Rule 60(a), this circuit "focuses on what the court originally intended to do" Blanton v. Anzalone, 813 F.2d 1574, 1577 (9th Cir. 1987) emphasis in original).

In this case the district court determined the loans were usurious and then considered what remedial measures would be appropriate. The district court distinguished Pease v. Taylor, 88 Nev. 287, 496 P.2d 757 (1972). It concluded that Smith had fair use of the money loaned to her and that she "should not be awarded a windfall of the ten percent interest she expected to

pay." It is clear that the district court "originally intended" to hold Smith liable for the ten percent interest, and this intent was unequivocally stated in the judgment. Therefore the district court did not abuse its discretion in denying Smith's Rule 60(a) motion.

2. Rule 60(b)(1)

Smith also requests relief from the judgment due to "mistake, inadvertance, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). A denial of relief under Rule 60(b) is reviewed for an abuse of discretion. Thompson v. Housing Authority of Los Angeles, 782 F. 2d 829, 832 (9th Cir.) cert. denied, 107 S.Ct. 112 (1986).

The court must consider (1) absence of notice under Fed. R.Civ. P. 77(d); (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and

(4) due diligence by counsel in attempting to be informed of the date. Id. at 460. "Ignorance of court rules does not constitute excusable neglect." Swimmer v. IRS, 811 F.2d 1343, 1345 (9th Cir. 1987).

Although Smith's counsel presents a compelling explanation as to why he was unable to file the 59(e) motion with the alloted ten-day period, he has not shown that the district court abused its discretion. There was no error on the part of the clerk or the judge. Smith's counsel had notice that the judgment had been entered. We will not grant relief when it is clear from the record that Smith's counsel knew the judgment had been entered.

3. Fed. R.App. P. 4(a)(5)

Smith also appeals the district court's denial of an extension of time or filing a notice of appeal. Relief is not available

under Fed. R.App. P. 4(a)(5). Because the untimely Rule 59(e) motion did not toll the statutory time in which to appeal, the notice of appeal was not timely. See Browder v. Director, Dept. of Corrections. 434 U.S. 257, 264-54 (1978); Fiester v. Turner, 783 F.2d 1474, 1475 (9th Cir. 1986).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH,	(FILED 7/30/87)
Plaintiff-Appellant	NO. 85-1611
vs.	DC#CV-LV-79-111 -LDG
INTERNATIONAL FUNDING CORPORATION, a California corporation, et al.,	Nevada-Las Vegas
Defendant-Appellees	ORDER

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Before: SKOPIL, FARRIS, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny appellant's petition for rehearing.

The petition for rehearing is denied.

Filed October 6, 1983
Entered October 7, 1983
U.S. District Court
District of Nevada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, an individual, JANET R. ELERDING, an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	)	CV-LV-79-111,HEC JUDGMENT

This action came on for trial before the court and issues having been duly

tried and a Decision having been duly rendered,

IT IS ORDERED AND ADJUDGED as follows:

1) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the sum of $11,520, representing the prepayment penalty on a loan transacted in 1976.

2) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the sum of $35,000, constituting loan fees paid by the Plaintiff unto said Defendants by reasons of loans transacted in 1976 and 1978.

3) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California

corporation, the incremental portion of interest above 10 percent paid by the Plaintiff unto the Defendants on loans transacted in 1976 and 1978.

4) That Plaintiff have judgment against the Defendants Max D. Martin and International Funding Corporation, a California corporation, in that this court adjudges the loan obligations created by the transactions in 1976 and 1978 to be usurious and the Plaintiff is hereby relieved of any obligation to pay any sum of interest thereon exceeding 10 percent per annum.

5) That the Plaintiff take nothing by reason of her cause of action against the Defendants Charles E. Elerding and Janet R. Elerding and said action is dismissed on the merits.

6) That the Counter-claimants Max D. Martin and International Funding

Corporation, a California corporation, take nothing by reason of their said Counter-claim against the Plaintiff and that the same be dismissed on the merits.

7) That the Defendants Charles E. Elerding and Janet R. Elerding take nothing by reason of their Cross-claim filed against the Defendants Max D. Martin and International Funding Corporation, a California corporation, and that said action be dismissed on the merits.

8) That the Preliminary Injunction heretofore issued is dissolved.

DATED: This 6th day of October, 1983.

/s/ HARRY CLAIBORNE
CHIEF JUDGE, U.S. DISTRICT COURT

WILLIAM L. McGIMSEY
A Professional Corporation
720 S. Fourth Street, #300
Las Vegas, NV. 89101
382-9948

Attorney for Elerdings

(Entered December 28, 1984, by Clerk, U.S. District Court)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC

ORDER DENYING MOTIONS

Plaintiff's following Motions:

1. Motion for Reconsideration of

Order and Clarification of Judgment Entered December 19, 1983; and

Motion to Treat Plaintiff's Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. Rule 60(a) or, in the alternative, to Grant Plaintiff Relief from the Judgment Entered October 7, 1983, under F.R.C.P. Rule 60(a) filed this date.

2. Motion for Reconsideration of Order Entered December 19, 1983, or Motion to Treat Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. 60(b) or in the alternative Motion to Grant Plaintiff Relief from Judgment under F.R.C.P. 60(b) as filed this date; and

3. Motion under F.R.C.P. 4(a)(95) to Extend the Time for Filing Notice of Appeal,

having come on to be heard on November 23, 1984, Plaintiff appearing together with counsel JOHN P. FOLEY, ESQ., Defendants, Elerdings appearing together with counsel, WILLIAM L. McGIMSEY, ESQ., and RAYMOND G.

ALVARADO, ESQ., and Defendant, International Funding Corporation appearing through counsel, ROBERT W. STORY, ESQ., of Lionel, Sawyer & Collins, the Court having heard and considered the argument of counsel and the file herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Plaintiff's following motions, to wit:

1. Motion for Reconsideration of Order and Clarification of Judgment Entered December 19, 1983; and

Motion to Treat Plaintiff's Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. Rule 60(a) or, in the alternative, to Grant Plaintiff Relief from the Judgment Entered October 7, 1983, under F.R.C.P. Rule 60(a) filed this date.

2. Motion for Reconsideration of Order Entered December 19, 1983, or Motion to Treat Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. 60(b) or in the

alternative Motion to Grant Plaintiff Relief from Judgment under F.R.C.P. 60(b) as filed this date; and

3. Motion under F.R.C.P. 4(a)(95) to Extend the Time for Filing Notice of Appeal,

are hereby denied.

ORDERED this /27th/ day of December,1984.

/s/ LLOYD D. GEORGE
District Judge

Submitted by:

/s/ WILLIAM L. McGIMSEY, ESQ.
WILLIAM L. McGIMSEY, ESQ.
720 S. Fourth Street, # 300
Las Vegas, NV 89101
Attorney for Elerdings

APPROVED AS TO FORM:

/s/ JOHN P. FOLEY
JOHN P. FOLEY, ESQ.
601 S. Rancho Drive, #A-1
Las Vegas, NV 89106

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation, et al., Defendants.	(RECEIVED & FILED ON 10/31/85) (ENTERED 11/01/85) CV LV 79-111, LDG

ORDER

On October 6, 1983, after hearing a trial before the Court in this case, Judge Harry E. Claiborne issued Findings of Fact and Conclusions of Law, a written Decision, and a Judgment. The Judgment was entered on October 7, 1983. Thirteen days after entry of judgment, the Plaintiff filed a motion under Rule 59 of the Federal Rules of Civil

Procedure to alter or amend judgment. Visiting United States District Judge Richard M. Bilby subsequently denied this motion on December 16, 1983, because more than the maximum ten days had elapsed since entry of the Judgment. On January 17, 1984, the Plaintiff gave notice to this Court of her appeal of parts of the Judgment of October 6, 1983, and also of Judge Bilby's Order of December 16, 1983. The Defendants made a motion to dismiss Plaintiff's appeal, and the Ninth Circuit granted the Motion to Dismiss in July, 1984.

Undaunted, Plaintiff filed on December 4, 1984, a motion with this Court under Federal Rule of Civil Procedure 54(b) for an order directing the final judgment on one or more, but fewer than all, of the claims or parties.

This motion was basically a request for this Court's order that Judge Claiborne's Judgment entered October 7, 1983, be determined not to be a final judgment. This Court was reminded of the Rule 54(b) motion at a hearing held on May 13, 1985, at which time the Court directed the Plaintiff to request that the Ninth Circuit remand the 54(b) motion back to this Court. The Plaintiff sought and was granted this remand.

This Court is now faced with the question of whether Judge Claiborne's Judgment of October 7, 1983, was a final judgment. If the Judgment was final then the Plaintiff probably has no recourse against it because of the late filings of her post-trial motions and appeals. If, on the other hand, Judge Claiborne's Judgment was not final, then the Judgment

continues to be subject to modification and the time for its appeal has not yet begun to run.

What constitutes a final judgment is a question that has been addressed several times by the United States Supreme Court. In Catlin v. United States, 3245 U.S. 229, 233 (1944), the Court stated that "(a) 'final decision' generally is one which ends the litigation on the merits and leave nothing for the court to do but execute the judgment." In a later case, the Court went on to say that "(s)o long as the matter remains open, unfinished or inconclusive , there may be no intrusion by appeal." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1948). Finally, in the case most heavily relied upon by plaintiff and

defendants in the instant action, the Court found that whether a judgment is final "depends upon whether the judge has or has not clearly" so intended. United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (9158).

The Schaefer case is the most applicable to the instant case. In Schaefer, the district judge granted a motion for summary judgment and issued a written opinion which was entered as a judgment by the clerk. Subsequently, the moving party presented to the judge a formal judgment, which the judge signed and had the clerk enter. The "judgment" differed from the earlier "opinion" in its title and its more specific assessment of interest and costs. An appeal to the summary judgment was later filed. The appellate court found the

appeal untimely since it was taken more than 60 days after the entry of the trial court's original opinion. The United States Supreme Court reversed the appellate court after determining that the "opinion" was not a final judgment, and that the appeal was within 60 days of the "judgment."

In the instant case the Plaintiff and Defendants rely on different language from Schaefer to support their respective positions. The Plaintiff favors language to the effect that the dollar amount of a money judgment must appear on the face of the judgment. In this regard the Schaefer Court stated:

> Rule 79(a) expressly requires that the clerk's entry "shall show . . . the substance of (the) judgment of the court . . . " Surely the amount of a

> judgment for money is a vital part of its substance. To hold that one must search the whole record to determine the amount, or the facts necessary to compute the amount of a final judgment for money would be to ignore the quoted provision of Rule 79(a).

Id. at 234-35. The Plaintiff argues that since, in the instant case, the amount of damages is not ascertainable without reference to documents other than the Judgment, the Judgment reference to documents other than the Judgment, the Judgment cannot be a final judgment.

The Defendants rely on language from Schaefer to the effect that the judge's intent controls and that the amount of a judgment may be determined by reference to material outside of the judgment. The Schaefer Court stated:

> (I)t is obvious that a final judgment for money must, at least, determine, or specify

> the means for determining, the amount (United States v. Cooke (CA9 Hawaii) 215 F.2d 528, 530); and an opinion, in such case, which does not either expressly or by reference determine the amount of money awarded reveals doubt, at the very least, whether the opinion was a "complete act of adjudication . . . or was intended by the judge to be his final act in the case.

Id. at 233-34. The Defendants argue that a search of the entire record is not necessary to determine the amount of the Judgment in the instant case. Rather, all that is necessary is reference to Judge Claiborne's extensive Findings of fact and Conclusions of Law and his Decision, both of which were issued concurrently with his Judgment.

The Schaefer case is distinguishable from the instant case. In Schaefer, the Court determined which

of two filed "judgments" was the final judgment as follows:

> The actions of all concerned--of the judge in not stating in his opinion the amount, or means for determining the amount, of the judgment; of the clerk in not stating the amount of judgment in his notation on the civil docket; of counsel for the Government in not appealing from the "Opinion"; of counsel for respondent in preparing and presenting to the judge a formal "judgment" on May 24; and, finally, of the judge himself in signing and filing the formal "judgment" on the latter date--clearly show that none of them understood the opinion to be the judge's final act or to constitute his final judgment in the case.

Id. at 355-56.

Evidence as to the intended status of Judge Claiborne's Judgement in this case is very different than that as to the "opinion" in the Schaefer case. First, there is no indication that

counsel for Plaintiff or Defendants initially treated Judge Claiborne's judgment as anything but final. Counsel for the Plaintiff filed post-judgment motions and appeals following the judgment as if it were final. Only when Plaintiff discovered that she had missed a filing deadline did she question the finality of Judge Claiborne's Judgment. Second, Judge Claiborne himself never issued a further judgment, nor is there indication that he intended to alter or supplement his decision. Rather, Judge Claiborne's Judgment and accompanying documents were very extensive. Finally, although the Clerk's entry of Judgment was not specific as to the amount of judgment, it did express the substance of the Judgment as to who prevailed on which counts. The Clerk's entry also referred

to the Judgment, from which the amount of judgment could be ascertained when read in conjunction with the Findings of Fact and Conclusions of Law and the Decision.

For the foregoing reasons, it is hereby

ORDERED that the Judgment entered in this case on October 7, 1983, be determined a final Judgment.

DATED: October 31, 1985

/s/
LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC FINDINGS OF FACT AND CONCLUSIONS OF LAW. Received and Filed October 6, 1983 Carol C. Fitzgerald District Clerk

This matter was set for a court trial which took place from April 13, 1983 through April 21, 1983. The parties were directed to file post-trial briefs with the court, and a hearing of arguments on the post-trial briefs was conducted on May 31, 1983. On that date, the court took the case under submission.

The lawsuit is brought by Keely Smith against Defendants International Funding Corporation (hereinafter "IFC"), a California corporation, Max Martin (hereinafter "Martin") and his wife Marguerite Martin, California residents, and Charles Elerding ("Elerding") and his wife Janet. Plaintiff has sued for damages, injunctive relief, and recission of two loan transactions which were entered into with Defendant IFC. The relief sought by Plaintiff against the remaining Defendants is derivative, based upon theories of agency and alter ego. The Defendants Elerdings and T.D. Service Company have cross-claimed for indemnity against the Defendants IFC and Martin. Defendant IFC has counterclaimed against Plaintiff for judgment on the notes signed by the Plaintiff as well as for foreclosure upon the real and personal property securing said notes.

FINDINGS OF FACT

1. Defendant IFC is a corporation organized under the laws of the State of California, and at all times relevant to the action was licensed as a personal property broker pursuant to California law. IFC was incorporated on November 21, 1975, and Max Martin served as President of the corporation at all times relevant to this lawsuit. Defendants the Martins and Elerdings were at all times relevant to this suit residents of the State of California.

2. During the first part of May, 1976, Plaintiff Keely Smith met with Defendant Martin in the State of California to discuss a loan to be made to Smith by IFC. Also in the early party of 1976, Martin approached Elerding and told him that he was operating a company called International Funding Corporation and asked him if he was interested in

lending him $220,000 so Martin could make a loan to Plaintiff Smith. Martin and Elerding had had prior business dealings dated from 1973, at which time Elerding first became acquainted with Martin, who was then employed by Far West Mortgage Company. Elerding, himself, had been in the business of making loans on real estate since 1973, and had made approximately fifty such loans between 1973 and May of 1980. In making these real estate loans, Elerding would lend money directly to a broker, usually a second trust deed broker or personal property broker.

3. On or about May 6, 1976, Plaintiff Smith went to the offices of IFC in Los Alamitos, California where she executed the following documents: 1) a Promissory Note in the amount of $160,000.00, and a Deed of Trust on Plaintiff's home at 46 Country Club Drive, Las Vegas, Nevada, securing this note

(Plaintiff had owned the Nevada residence since 1962); 2) a Promissory Note in the amount of $60,000, and a Deed of Trust on Plaintiff's residence at 10436 Kling Street, Toluca Lake, California, securing this note; and 3) security agreements on all of Plaintiff's personal property located in the Toluca Lake and Las Vegas homes, securing these two Promissory Notes.

4. Defendant IFC had, prior to May 6, 1976, received a loan commitment from Defendants, the Elerdings, wherein the Elerdings agreed to loan to Defendant IFC the sum of $220,000, which sum would be used by Defendant IFC to fund the loan to Plaintiff. These funds were received by Defendant IFC, and a Promissory Note was executed by IFC in the amount of $220,000. After the execution of the notes and security documents by Plaintiff Smith, as described above, the beneficial

interest in said documents was assigned by Defendant IFC to Defendants, the Elerdings, as collateral security for the Promissory Note from IFC to the Elerdings.

5. Plaintiff also executed the following documents in connection with the May, 1976 loans she received from IFC, which loans aggregated to $220,000:

A. Escrow instructions.

B. Directions to deposit the loan proceeds to the account of Keely Smith Enterprises, Inc.

C. Certification that Smith was a California resident at the time of the transaction.

D. Two statements of valuation of personal property.

E. Two certifications that the proceeds of the loans would be used in her business, Keely Smith Enterprises, Inc.

F. Two Truth in Lending Disclosure Statements.

G. UCC-1 financing statement relative to the $60,000 loan.

H. UCC-1 financing statement relative to the $120,000 loan.

In consideration of the $60,000 Promissory Note, Plaintiff Smith received $60,000, from which the loan proceeds were distributed as follows:

Funds paid through escrow to retire second trust Deed on Toluca Lake property.	$39,437.50
Property taxes paid through escrow	3,055.27
Cash received by Plaintiff from IFC per check #1217	$ 217.33
Total	$42,710.00

The above amounts were received on or about May 11, 1976. In addition to the foregoing amounts, Plaintiff received a check #1216 from

IFC in the sum of $10,800, which Plaintiff endorsed in favor of Defendant IFC for payments of the first year's interest. Of the remaining balance $6,000 was paid out of escrow to IFC as loan fees, and $490 represented miscellaneous legitimate closing costs in connection with the $60,000 loan.

In consideration of the $160,000 Promissory Note, Plaintiff Smith received $160,000 form which loan proceeds were distributed as follows:

Cash received by Plaintiff from IFC per check # 1219, 5/11/86	$88,537.00
Cash received by Plaintiff from IFC per check # 1521, 10/15/76	$28,000.00
Total	$116,537.00

In addition to the foregoing amounts, On May 11, 1976, Plaintiff received a check from IFC, #1218, in the sum of $28,800 which was immediately endorsed over to IFC as prepayment of

the first year's interest. Of the remaining balance, the sum of $14,000 was paid out of escrow to IFC on a loan fee and, $663 represented miscellaneous closing costs.

The parties admit that Defendant Elerding was aware that the Promissory Notes executed by Plaintiff Smith on these loans provided for interest at the rate of 18%. On or about February 28, 1977, Plaintiff sold her Toluca Lake residence. The $60,000 note was paid in full at the closing, along with payment of a $4,320 prepayment penalty, less a rebate of the interest already paid, amounting to $1,860. Thereafter, the Deed of Trust on the Toluca Lake residence securing the $60,000 not was reconveyed to the Plaintiff. In January of 1978, Plaintiff was unable to make the payments on the $160,000 note as they came due, and Defendant IFC contacted Plaintiff regarding her default, at which time the

possibility of refinancing the loan was explored. Defendant IFC received a commitment from Defendants the Elerdings for the loan of an additional $300,000, which would be loaned by IFC to Plaintiff Smith for the purpose of refinancing the existing $160,000 loan, which Plaintiff was having difficulty meeting. When Plaintiff learned of the commitment which IFC obtained from the Elerdings, she immediately requested that the refinancing loan be funded. Prior to January, 1978, Plaintiff had paid eight monthly interest payments to IFC at the rate of $2,400 per month for the months May through December, 1977, amounting to a total of $19,200.

6. On or about March 2, 1978, Plaintiff executed the following documents in Las Vegas, Nevada:

A. Promissory Note in the amount of $300,000.

B. Deed of Trust on her Las Vegas property, securing the note.

C. Escrow instructions.

D. Disbursement instructions.

E. Certification that Smith as a California resident at the time of the transaction.

In order to receive funding for this loan, Defendant IFC executed a Promissory Note dated March 10, 1978 in the sum of $300,000 in favor of Defendants the Elerdings. In addition, Defendant IFC executed an Assignment of Deed of Trust in favor of Defendants the Elerdings.

In consideration of the $300,000 Promissory Note Plaintiff executed, she received $300,000 from which loan proceeds were distributed out of escrow as follows:

Check drawn to Keely Smith Enterprises, Inc. on the account of IFC.... $ 42,280.00

Pay off of the $160,000 loan $160,000.00

Prepayment penalty to IFC on the $160,000 loan..... $ 11,520.00

Delinquent monthly interest payments for the months of January, February and March 1978..... $ 7,200.00

Loan fee to IFC ..... $ 21,000.00

Prepayment to IFC of first year's interest. $ 54,000.00

As noted above, the sum of $42,280 was distributed to Plaintiff from IFC's California Bank to Keely Smith Enterprises, Inc.'s account at American City Bank, Beverly Hills, California. The $160,000 note was retired and a Full Reconveyance of Deed of Trust on Plaintiff's Las Vegas property securing the $160,000 loan was recorded with the Clark County, Nevada Recorder on March 13, 1978.

7. In April of 1979, Plaintiff failed to pay the IFC monthly installment of

$4,500 interest which was alleged to be due and payable on or about April 10, 1979 pursuant to the terms of the $300,000 Promissory Note executed by Plaintiff in favor of Defendant IFC. In April, 1979, Defendant IFC failed to pay to Defendants the Elerdings the monthly payment of $2,500 interest which was due and payable on or about April 10, 1979 pursuant to the $300,000 Promissory Note executed by IFC in favor of Defendants the Elerdings. Plaintiff Smith has paid no further monthly interest installments to defendant IFC. Defendant IFC in turn, has paid no further interest installments to Defendants the Elerdings.

8. On May 15, 1979, Defendants the Elerdings recorded in the Clark County, Nevada Recorder's Office a Notice of Substitution of Trustee, substituting T.D. Service Company as trustee of the Deed of Trust dated March 2, 1978, executed by Plaintiff in favor of IFC.

On May 15, 979, the Defendants the Elerdings also recorded a Notice of Default relating to the Deed of Trust dated March 2, 1978 executed by plaintiff Smith in favor of IFC. Subsequently, on or about June 14, 1979, Plaintiff filed with this court a Motion for Temporary Restraining Order and for a Preliminary Injunction and a Complaint for, inter alia, Intentional Breach of Contract, Fraud, Usury, and a Permanent Injunction. The Complaint gave notice to the defendants of Plaintiff's election to rescind the three loan transactions and demanded return of all monies paid by Plaintiff to Defendants, together with interest at the rate of 7% from the date of each payment, and further demanded that Defendants reconvey all right, title and interest claimed in Plaintiff's Nevada residence at 46 Country Club Lane, Las Vegas,

Nevada. Plaintiff has owned this residence since 1962.

This court granted Plaintiff a preliminary injunction, thus restraining the Defendants from selling, leasing, encumbering, releasing or otherwise affecting their interest in Plaintiff's residence. Defendants were further enjoined from failing to toll the running of Plaintiff's time for reinstatement or redemption under N.R.S. §107.080.

9. Regarding the business relationship between the Elerdings and IFC, the parties agree that Defendants the Elerdings paid loan proceeds due to IFC under the terms of the Promissory Note from IFC to the Elerdings in the following amounts and on the following dates by checks drawn payable to the order of Martin:

$12,120	check no. 4352	March 9, 1978
$21,000	check no. 4351	March 9, 1978

$17,250 check no. 4365 March 22, 1978

Additionally, Defendants the Elerdings paid IFC the sum of $46,280 by check no. 4353 dated March 9, 1978, payable to the order of IFC.

10. Regarding Plaintiff's state of residence, the parties have agreed that Plaintiff Smith has paid no state income taxes in California other than real property taxes on her California residences. Furthermore, Plaintiff has no California driver's license, but only one issued by the Department of Motor Vehicles, Las Vegas, Nevada. The parties agree that at no time did Defendants the Elerdings, see any of the loan documents executed by Plaintiff prior to the time escrow closed and the documents were recorded.

11. And finally, the parties have agreed that at all time relevant to this lawsuit, Plaintiff Keely Smith's occupation was as a professional singer and entertainer.

Keely Smith conducted and carried out her business as a professional singer and entertainer through the entity known as Keely Smith Enterprises, Inc., a corporation wholly owned by her and organized under and pursuant to the laws of the State of Nevada. Keely Smith Enterprises, Inc., maintained a bank account (No. 528-002191) at American City Bank in Beverly Hills, California. Keely Smith maintained personal bank accounts at City National Bank (No. 06-088226) in Los Angeles, and First National Bank (No. 819/392/2) in Las Vegas, Nevada.

12. On August 9, 1979, Defendants the Elerdings filed a Cross-Complaint for Indemnity against Max D. Martin, Marguerite Martin and IFC. During the trial, the court ordered that all evidence admitted in the main action also be admitted for the purposes of the Cross-Complaint for Indemnity. In

addition, during the trial of the case, the court granted a motion for involuntary dismissal, pursuant to Federal Rules of Civil Procedure 41(b) as to Defendants Marguerite Martin and T.D. Service Company. This same motion was denied as to Defendants Max Martin, IFC, Charles Elerdings and Janet Elerding.

13. The 1976 loan was negotiated, executed and performed in the State of California. The 1978 loan transaction was contracted for in the State of Nevada. The location of the subject matter collateral was in Nevada. The loan documents were executed in the State of Nevada. The Plaintiff (borrower) was then a resident of the State of Nevada. These factors, taken in aggregate, establish that Nevada has the most "significant relationship" to the 1978 transaction.

14. The Defendant Martin and IFC had only a brokers license which authorized

them to act as a broker in connection with loans made through those brokers listed with the Administrator of the Personal Property Brokers Laws of the State of California. Dr. Elerding was not on this list nor was he a licensed personal property broker.

15. The evidence demonstrates that the Plaintiff entered into the loan transactions in order to secure funds with which to put an act together and get back to work as an entertainer and so represented that purpose to defendant Martin at all times during the various discussions regarding the loans; that such purposes was business related and not for consumer purposes.

16. At no time during the subject transactions did Dr. Elerding enter into any contractual relationship with the Plaintiff. He only provided funds to Martin and IFC and in exchange therefore, he received an

assignment of the Smith Notes and Deeds of Trust. He had no personal contact with Smith during these transactions. He did not participate in any form of conspiracy, either for breach of an oral agreement to loan money or for conspiracy to defraud. The evidence fails to indicate that the Defendants ever conspired to do any wrongful acts against Plaintiff Smith regarding either the 1976 or 1978 loans.

Consequently Defendant Martin and IFC could not conspire between them to injure Plaintiff since they are one entity. Martin's activities in relation to the corporation's business are the acts of the corporation and while so acting, he could not conspire with the corporation of which he was a part.

Furthermore, I find that Plaintiff Smith was no defrauded by Elerding. He merely loaned money to Martin and IFC, which in turn was then loaned by Martin and IFC to Smith.

There is no evidence of any representations made by the Elerdings to Plaintiff Smith upon which she relied.

17. The rate on advances to member banks of the Federal Reserve Bank of San Francisco on or about January of 1976 and on or about November of 1976 was 5-1/2 percent. This figure, added to an additional 5 percent as allowed by the California Constitution allows a maximum non-usurious rate of 10-1/2 percent for which the parties could contract in writing as the rate of interest on the 1976 loans.

18. Exhibits 1 and 2, the Promissory Notes executed by Plaintiff, $160,000 and $60,000 respectively, carry an interest rate of 1-1/2 percent per month, or 18 percent per annum and therefore usurious to the extent of 7-1/2 percent per note.

19. That the lowest daily prime rate in Nevada in March 2, 1978, the date of the execution of the 1978 refinanced loan of $300,000, was 8 percent. The Nevada law provides that parties may agree to interest not exceeding 12%. Exhibit 10 shows that the note executed on March 2, 1978 bore an interest rate of 18 percent. I find that this note was usurious under Nevada Law (NRS 99.050(1)) to the extent that it exceeded the 12 percent per annum maximum non-usurious rate by 6 percent.

20. The evidence demonstrates that the Plaintiff at all times incident to the loans thought and expected all of the loans that she executed with IFC to bear a rate of 10 percent per annum, a rate of interest to which she was amenable; that Smith expected and was prepared to pay interest at 10%, which rate would have been non-usurious.

21. I find that the Plaintiff had fair use of the monies received from these loans and she should not reap a windfall of the 10 percent she expected to pay and which she claims was the bargained-for rate of interest on the loans.

22. I find that the Defendants Martin and IFC, as procurers of the loans for Plaintiff, were acting as Plaintiff's agent (testimony of Martin). These Defendants had a fiduciary duty to Plaintiff. These Defendants breached that duty. This resulted in the Plaintiff being charged numerous unwarranted fees and expenses as well as the additional increment of interest on the 1976 and 1978 loan transactions. Defendant Martin clearly violated his fiduciary duty to Plaintiff by simultaneously acting as a principal in these loan transactions and at the same time pretending to act solely as her agent.

23. That as a result of the wrongful acts of the Defendants Martin and IFC, through its agent Martin, said Defendants should be precluded from any right to compensation which they might otherwise have had as brokers of the loans to Plaintiff Smith and be required to disgorge to her all monies received from her, including all profits, commissions and expenses which they exacted incident to the 1976 and 1978 loan transactions.

For this reason, I specifically find that both the 1976 loan fee of $14,000 and the 1978 loan fee of $21,000 which Plaintiff was required to pay to Defendants IFC and Martin, were unwarranted and should be refunded to Plaintiff. And further, the incremental portion of interest above 10 percent on the 1976 loans and the 1978 loan should likewise be credited against what Plaintiff owes on the

outstanding $300,000 obligation created in 1978.

24. Defendants IFC and Martin charged Plaintiff Smith with a prepayment penalty of $11,520 on the 1976 loan of $160,000 when she renegotiated it in order to obtain the $300,000 loan in 1978. The purpose of a prepayment penalty is to protect the lender against a loss of projected interest in the event of prepayment of the debt. This court specifically finds that the prepayment penalty charged by Defendants IFC and Martin was not warranted in this case. The loan, as renegotiated in 1978, bore the same interest rate as the 1976 loan. The $300,000 loan renegotiation represented no threat of loss of anticipated interest to the lender, since the original loan was replaced with another obligation of an equal interest rate,

and this loan provided for the same penalty in the event of prepayment.

25. As shown by Exhibit 11.2, the Counterclaimants have executed an assignment of the Deed of Trust to Charles E. Elerding and Janet R. Elerding, thereby divesting themselves of any beneficial interest therein. Subsequently, to the said assignment the Elerdings started foreclosure proceedings against the secured property of plaintiff.

26. This court having found that the Plaintiff Smith has not prevailed on any theory or issue she has asserted against the Defendants Charles Elerding and Janet Elerding, then the Cross-claim for Indemnity against the Defendant's Max Martin and IFC do not lie.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes as a matter of law as follows:

1. That the loan transactions of 1976 are governed by California law since the place of negotiation, execution, contract and performance was in the State of California.

2. That the 1978 loan transactions are governed by Nevada law since the transactions were contracted for in the State of Nevada, the location of the subject matter collateral was located in the State of Nevada, the loan documents were executed in the State of Nevada and the Plaintiff (borrower) was then a resident of the State of Nevada. These factors taken in aggregate establish that Nevada has the most "significant relationship" to said transaction.

3. That the California Personal

Property Brokers Law (California Financial Code Section 22000-22653) which regulates the licensing of the business activities of personal property brokers does not apply to the 1976 loan transaction.

4. That the 1978 loan transaction of $300,000, involving no personal property whatsoever is governed and subject to Nevada law.

5. That the Federal Truth in Lending Act, 15 U.S.C. § 1601, is not applicable to either of the loan transactions involved in this case.

6. That the Plaintiffs Elerdings and Martin, on behalf of IFC, did not conspire or combine together to do wrongful acts against Plaintiff regarding either the 1976 loan transaction as construed under California law nor the 1978 loan transaction as construed under Nevada law. (Orloff v. Metropolitan

Trust Co., 110 P.2d 396 (Cal. 1941); William Inglis & Sons v. ITT Baking Co., 668 F.2d 1014—(1981); and Webb v. Culberson, 357 F.Supp. 923 (1973)).

7. That the 1976 loan is usurious and must be determined according to the limitations set forth in Article 15, Section 1 of the California Constitution.

8. That the 1978 loan must be interpreted under Nevada usury laws and is usurious by 6 percent (NRS 99.050(3)).

9. That the Defendants Martin and IFC breached their fiduciary duty to Plaintiff which resulted in her being fraudulently charged unwarranted fees, expenses and commissions.

10. That disgorgement of monies or property fraud obtained by an agent from the principal is the proper remedy for breach of the fiduciary relationship. McDonald v.

BEST AVAIL

O'Meara, 473 F.2d 799, 93 S.CT. 2293, 412 U.S. 906 (1973).

11. The purpose of a prepayment penalty is to insure that the lender is indemnified in the event that projected interest due is lost because of prepayment on the debt. A lender is not entitled to a prepayment penalty when the loan is renegotiated and the renegotiated loan represented no threat of loss of anticipated interest to the lender.

12. The Counterclaim should be dismissed. The Counterclaimants had no beneficial interest in the Promissory Note and the Deed of Trust.

The Elerdings, by instituting foreclosure proceedings, precluded Counterclaimants from seeking the relief sought by the Counterclaim. (NRS 40.430(1)); Keever v. Nicholas Beer Co., 96 Nev. 509, 611 P.2d 1079 (1980)

ABLE COPY

Nevada Wholesale Lumber Co. v. Myers Realty, 92 Nev. 24, 544 P.2d 1204 (1976).

13. The Cross-claim of Elerdings against IFC and Martin should be dismissed.

DATED: This 6th day of October, 1983.

/s/ HARRY CLAIBORNE
CHIEF JUDGE, U.S. DISTRICT COURT

LAW OFFICES OF JOHN &
ELIZABETH FOLEY
601 S. Rancho, Suite A1
Las Vegas, Nevada 89106

Attorney for Plaintiff
702-386-5900

(Received and Filed October 20, 1983 by Carol C. Fitzgerald, Clerk)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC

MOTION UNDER F.R.C.P. RULE 59 TO ALTER OR AMEND JUDGMENT.

COMES NOW the Plaintiff and moves this Court pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, to alter or amend the judgment entered herein on October 7th, 1983 in the following particulars, and on the following grounds:

1. That paragraph 4 of said Judgment be amended to provide that Plaintiff be relieved of any obligation to pay any sum of interest whatsoever.

2. That the Preliminary Injunction heretofore issued be not dissolved until the Judgment entered herein becomes final.

LAW OFFICES OF JOHN P. FOLEY

BY: _____

JOHN P. FOLEY, ESQ.
601 S. Rancho, Al
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

At page 36, 37, 38 and 39, the Court discussed the Nevada cases of Pease v. Taylor, 88 Nev. 287, 496 P.2d 757; Kline v. Robinson, 83 Nev. 244, 428 P.2d 190; and the California case of Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15, Stephans v. Herman, 225 Cal.App. 2d 671, 37 Cal. Rptr. 746; E. Glushon, The California Usury Law, 43 Cal. St. B.J. 56, (1968).

Plaintiff respectfully urges that if the note had been executed at 10%, Plaintiff would not have found herself in the problem she did, and would not have been required to institute this action. Plaintiff feels that she is entitled to the benefit of the law that relieves her of the obligation to pay any interest on a usurious loan.

Plaintiff respectfully requests that the Preliminary Injunction remain in effect until the Decision is final in this case, so that all parties will know the amount of money involved in any foreclosure.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF JOHN P. FOLEY

BY: _____

JOHN P. FOLEY, ESQ.
601 S. Rancho, A1
Las Vegas, Nevada 89106
Attorney for Plaintiff

RECEIPT OF A COPY of the foregoing Motion is hereby acknowledged this 20th day of October, 1983.

LIONEL, SAWYER & COLLINS

BY: /s/ D.K./ST G

DENNIS KENNEDY ESQ.
1700 Valley Bank Plaza
300 So. Fourth Street
Las Vegas, Nevada 89101

WILLIAM L. McGIMSEY, ESQ.

BY: /s/WILLIAM McGIMSEY/et
WILLIAM L. McGIMSEY, ESQ
300 So. Fourth, # 600
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

The undersigned certifies that she served a copy of the foregoing Motion on the Defendants Elerding, by placing a copy thereof in the United States Mail, postage prepaid, addressed to the Defendants' attorney, as follows:

ALVARADO, RUS & McCLELLAN
A Professional corporation
Bank of America Tower, Suite 308
One City Boulevard, West
Orange, California 92668

DATED this 20 day of October, 1983.

/s/ MARLYS OSBURN
Marlys Osburn

NO. 87-819 (3)

JAN 11 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1987

KEELY SMITH

Petitioner

vs.

INTERNATIONAL FUNDING CORPORATION, a California Corporation; MAX D. MARTIN, an Individual; CHARLES E. ELERDING, JR., an Individual; JANET R. ELERDING, an Individual; and T. D. SERVICE COMPANY, a California Corporation

Respondents

On Appeal from the Ninth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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(702) 385-7474
(702) 382-9948
Attorneys for Respondents

NO. 87-819

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1987

KEELY SMITH

Petitioner

vs.

INTERNATIONAL FUNDING CORPORATION, a California Corporation; MAX D. MARTIN, an Individual; CHARLES E. ELERDING, JR., an Individual; JANET R. ELERDING, an Individual; and T. D. SERVICE COMPANY, a California Corporation

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I

THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE WRIT OF CERTIORARI ON THE GROUNDS THAT THE WRIT WAS NOT TIMELY FILED.

Rule 20 of the Rules of the Supreme Court of the United States deals with the time for petitioning. Rule 20.1 deals with the time for petitions for writ of certiorari to review judgments in criminal cases. Rule 20.2 provides as follows:

> A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

28 U.S.C. § 2101(c) provides as follows:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

No order extending the time for applying for writ of certiorari has been obtained and therefore in order to be timely filed, the order sought to be reviewed must have been entered on or after July 29,

1987. A review of the record shows that such is in fact not the case.

Initially, a review of the petition for certiorari and particularly the appendix thereto reveals that this is a petition seeking to review two orders of the United States Court of Appeals for the Ninth Circuit. The first order in Docket No. 85-2851 was entered on July 16, 1986 (Petitioner's Appendix, p.1). Thereafter the Petitioner filed a Petition for Rehearing. That petition for rehearing in Docket No. 85-2851 was denied by order entered September 29, 1986, a true copy of which is attached hereto and made a part hereof as Exhibit "A". Any petition for writ of certiorari to review this order would have to have been filed within ninety days of September 29, 1986. Clearly, it was not and therefore the petition is not timely as to the order entered in Docket No. 85-2851.

With regard to the order entered in Docket No. 85-1611, Petitioner's Appendix at page 4, indicates that that order was entered by the United States Court of Appeals for the Ninth Circuit on June 9,

1987. A petition for writ of certiorari should have been filed within ninety days of June 9, 1986 and this petition was not so filed. However, the time for filing a petition for writ of certiorari may be extended if a petition for rehearing is timely filed by any party in the case. If the petition for rehearing is timely filed, then the time for the filing of the petition for writ of certiorari runs from the date of the denial of rehearing.

In Case No. 85-1611, a petition for rehearing was filed and an order denying that petition for rehearing was entered on June 30, 1987, as shown at page 10 of Petitioner's Appendix. However, a review of the pleadings will show that the petition for rehearing filed in the United States Court of Appeals for the Ninth Circuit was not timely filed so as to toll the running of the time period for filing the instant writ.

Federal Rules of Appellant Procedure, Rule 40, deals with a petition for rehearing and states:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.
> . . . .

The order in this case was entered on June 9, 1987. The 14th day therefore would expire on June 23, 1987. Attached hereto and made a part hereof as Exhibit "B" is a copy of that petition for rehearing showing that it was filed on June 24, 1987. The petition for rehearing therefore was not timely and did not extend the time for filing the petition for writ of certiorari. Therefore, the 90-day period would have run from June 9, 1987 and would have expired long before the instant petition for writ of certiorari was filed.

Therefore, it is respectfully submitted that this Court should not consider the petition for writ of certiorari as it is jurisdictionally out of time.

II

THE PETITION FOR WRIT OF CERTIORARI DID NOT IN ANY EVENT STATE ANY REASON WHY THE CAUSE SHOULD BE REVIEWED BY THE COURT

Rule 17 of the Rules of the Supreme Court of the United States outlines considerations governing review on certiorari. The matters sought to be reviewed by the petitioner do not fit within any of the categories. There has been no showing that the

decisions sought to be reviewed are in conflict with the decisions of other federal courts of appeals on the same matter or in conflict with a state court of last resort on some federal question. The petition does not reveal or allege any gross departure from the accepted and usual course of judicial proceedings. The petition does not deal with a state court decision and the decisions sought to be reviewed do not deal with any important questions of federal law.

The writ filed by the petitioner is merely her attempt to once again advance the same positions which have always been decided against her by the United States District Court for the District of Nevada and the United States Court of Appeals for the Ninth Circuit.

The October 7th judgment was final and appealable. It contained an extensive opinion and thorough findings of fact and conclusions of law. The damages can be ascertained by referring to the opinion and the findings of fact and conclusions of law.

With regard to the review sought with respect to appeal Docket No. 85-1611, the Ninth Circuit found the District Court did not abuse its discretion in denying the Rule 60(a) motion. The petition for writ of certiorari shows no reason why this determination, that is the question of determination of abuse of discretion, should be reviewed by the United States Supreme Court.

It is therefore respectfully submitted that the writ for certiorari be denied.

Respectfully Submitted,

FRANK J. CREMEN, ESQ.
LAW OFFICES OF ALVARADO, RUS & McCLELLAN
LAW OFFICE OF WILLIAM L. McGIMSEY

By:_____
FRANK J. CREMEN, ESQ.
720 S. Fourth Street, #300
Las Vegas, NV 89101
Attorneys for Respondents, Elerding

10 11

FILED

SEP 29 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH, Plaintiff-Appellant, vs. INTERNATIONAL FUNDING CORPORATION, a California corporation, et al., Defendants-Appellees.	No. 85-2851 DC# CV-LV-79-111-LDG Nevada (Las Vegas) ORDER

Before: FLETCHER, NELSON and THOMPSON, Circuit Judges

Appellant's petition for rehearing is denied.

EXHIBIT "A"

A TRUE COPY
ATTEST 21 December 1987
CATHY A. CATTERSON
Clerk of Court
by: Barbara A. Alexander
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * *

FILED
JUN 24 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KEELY SMITH,

Plaintiff/Appellant,

v.

INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; CHARLES E. ELERDING, JR., et al.,

Defendants/Appellees.

Case No. 85-1611

D.C. No.: CV-S-79-111, LDG
Nevada (Las Vegas)

JOHN AND ELIZABETH FOLEY
QUAIL PARK II - SUITE A1
801 SOUTH RANCHO
LAS VEGAS, NEVADA 89106
(702) 388-8900

APPELLANT'S PETITION FOR REHEARING

This Court in entering its Memorandum Opinion June 9th, 1987, overlooks the fact that Plaintiff/Appellant has been unable to secure an interpretation of how much money Plaintiff/Appellant owes even assuming Judge Claiborne's Decision of October 6th, 1983 is final. An examination of Judge Claiborne's Judgment, Findings of Fact, Conclusions of Law and Decision do not reveal the amount Judge Claiborne felt was owing. The Orders entered by Judge Lloyd D. George do not deal with the amount of money owing. The following Orders of this Court do not reveal the amount due and owing. Attached hereto as Exhibit 1 is the Order of this Court filed May 22, 1984 by Judge Choy, Judge Goodwin and Judge Pregerson in case 84-1565; the Order by Judge Choy, Judge Goodwin and Judge Pregerson

EXHIBIT "B"

entered June 26th, 1984 in 84-1565, which is attached hereto as Exhibit 2; the Order of Judge Snead in Case 85-1611 entered August 8th, 1985 which is attached hereto as Exhibit 3; the Order of Judge Fletcher, Judge Nelson and Judge Thompson in Case 85-2851 entered July 16th, 1986 which is attached hereto as Exhibit 4; the Order of Judge Fletcher, Judge Nelson and Judge Thompson in Case 85-2851 entered September 29th, 1986 which is attached hereto as Exhibit 5; the Order of Judge Skopil, Judge Farris and Judge O'Scannlain in Case 85-1611 entered May 7th, 1987 which is attached hereto as Exhibit 6; and the Order of Judge Skopil, Judge Farris and Judge O'Scannlain in Case 85-166 entered June 9th, 1987, which is attached hereto as Exhibit 7.

The Respondent Elerding is now claiming $567,148.76 is due and seeks to foreclose for said sum. In November, 1983, Elerding asserted the amount due as of March 2, 1979 was $202,263.00, and $297,270.43 on November 13, 1983.

If Plaintiff/Appellant is required to pay 10% as ordered by Judge Claiborne on the amounts actually received by her, the amount would have been $158,780.61 as of March 2, 1979, eight years interest at 10% on that sum equals $127,024.48, equals $285,805.09 minus $35,000.00 paid equals $250,805.09.

This illustrates why one of the reasons Plaintiff/Appellant is fighting so hard to be relieved of a very unjust

...

...

JOHN AND ELIZABETH FOLEY
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LAS VEGAS, NEVADA 89106
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 EXHIBIT "B"

situation arising out of a technicality and the issue of the amount due should be dealt with by this Court.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF JOHN & ELIZABETH FOLEY

BY: _____
JOHN P. FOLEY, ESQ.
601 So. Rancho, Suite A1
Las Vegas, Nevada 89106
Attorney for Plaintiff/
Appellant

RECEIPT OF A COPY of the foregoing Petition for Re-hearing is hereby acknowledged this 3rd day of June, 1987.

BY: WILLIAM L. McGIMSEY
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720 S. Fourth Street, # 300
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Elerdings

BY: _____
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 EXHIBIT "B"